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# Commentary

## The "Bounty Hunter" Objection to Antitrust Litigation

*Henry Kane\**

The purpose of this article is to examine the validity of the "bounty hunter" objection to plaintiff's treble damage antitrust litigation, to review the difficulties encountered by the treble damage "bounty hunter" and to suggest how states and other public bodies may make more effective use of the antitrust laws.<sup>1</sup>

"Status for the Bounty Hunter . . . and Other Recent Developments in Private Antitrust Litigation"<sup>2</sup> by Mr. John C. Scott, developed the "bounty hunter" theme first enunciated by Earl E. Pollack in an address before the Section of Antitrust Law of the American Bar Association.<sup>3</sup> Mr. Scott recalled his boyhood feelings of guilt when he collected noxious animal bounties, for his favorite author took a dim view of bounty hunters and "it just didn't seem right to get paid for having so much fun."<sup>4</sup> Indeed, ". . . the bounty hunter of the Old West is seldom portrayed as an admirable character. . . ."<sup>5</sup> This quixotic approach was then put to the hard facts of Antitrust Law, and Mr. Scott concluded:

. . . it was not the pronouncements of a Supreme Court blessing that opened the Golden Age of the antitrust bounty hunter. That era arrived with the filing of some 1900 treble-damage suits in the wake of the 1960 convictions and 1961 sentencing of the electrical equipment industry for conspiring to fix prices. It was what these cases did for bounty hunters that makes the Supreme Court's helpful attitude so significant to the business world and to the legal profession. . . . People with ample means to finance the long search and the complex shoot-out are now bounty hunters."<sup>6</sup>

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1. The antitrust laws are set forth in detail in E. W. GASS, *Private Enforcement of the Robinson-Patman Act: The Damage Controversy*, XV ANTITRUST BULLETIN 153, 158-159 (1970).

2. 7 DUQUESNE L.R. 353 (1969).

3. E. S. POLLACK, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 ANTITRUST L.J. 5, 38 (1966).

4. *Supra* note 2 at 353.

5. *Id.* at 359.

6. *Id.* at 363-364.

Before proceeding to analyze the two addresses<sup>7</sup> to determine whether antitrust plaintiffs as a class or any of them are "bounty hunters" and whether the decisions on which they rely are in accord with the antitrust laws, it is helpful to examine treble damage litigation from the viewpoint of a prospective defendant with reason, well-founded or otherwise, to fear liability. Mr. Scott is correct in stating that in recent years the opinions of the Supreme Court "have made increasingly warm statements about private antitrust litigation."<sup>8</sup> The statements have been in decisions which reversed lower court decisions for antitrust defendants.<sup>9</sup>

The stakes in a treble damage action can be high for a defendant, whether he be large or small. The adverse publicity can have an adverse effect on the price of a company's stock or its efforts to obtain financing. A pending antitrust case challenging the validity of a company's method of doing business can make the company's stock "speculative." Unless a case is dismissed on a motion for summary judgment at the commencement of the litigation, defense costs are heavy. For example, the General Counsel for a defendant in a subsequently settled series of treble damage class actions said in open court that his company had paid about \$500,000 per year in legal expenses and costs to defend itself. Antitrust judgments or settlements can also have a noticeably adverse effect on earnings, and may require payment over a period of years if the defendant is to remain solvent. In cases involving multiple defendants the larger defendants may pay a disproportionate amount of the settlement package.

No accurate totals on treble damage awards and settlements can be made with assurance because most antitrust cases are settled. The settlements are confidential unless the plaintiff is a public body or the court approves a class action settlement.<sup>10</sup> However, a partial list of recoveries indicates that total antitrust judgments and settlements since 1960 is approaching the \$1 billion mark. Recoveries were about \$600 million in the electrical equipment conspiracy cases.<sup>11</sup> The Western Pipe Cases, excluding recently filed cases,<sup>12</sup> were settled for about

7. *Supra* notes 2 and 3.

8. *Supra* note 2, at 363.

9. *Infra* note 42.

10. Rule 23(e), Federal Rules of Civil Procedure.

11. J. L. ALIOTO, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 88 (1966); H. R. HALPER, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 ANTITRUST L.J. 98, 115 (1966).

12. *In re Concrete Pipe (West)*, 303 F. Supp. 507; *State of Utah v. American Pipe and Construction Company*, 49 F.R.D. 17 (C.D. Cal. 1969).

\$30 million. The copper and brass tubing litigation, notable for use of a formula to determine the amount of tubing in a structure, was settled for about \$22,175,000.<sup>13</sup> A \$100 million settlement of 66 class actions was approved in *State of West Virginia v. Chas. Pfizer & Co.*<sup>14</sup> The single case record is *Trans World Airlines v. Hughes*,<sup>15</sup> in which the Court awarded attorneys' fees of \$7.5 million following award of damages trebled to \$137,611,435.

Antitrust and other plaintiffs are aided in their discovery, which can be the difference between a plaintiff's or a defendant's verdict, by recent amendments to the Federal Rules of Civil Procedure. Amended Rule 34 removes the "good cause" requirement that often proved an obstacle to obtaining an order for production of defendant's documents. Rule 33 interrogatories and Rule 34 requests for production of documents now can be served with the complaint, giving him priority of discovery where such priority can be vital.

The coordination procedures authorized by 28 U.S.C. §1407 and administered by the Judicial Panel on Multidistrict Litigation can be of material assistance to antitrust plaintiffs by providing for assignment of all cases to one judge.<sup>16</sup> This procedure enables a multitude of small plaintiffs to combine their resources and thereby increase the strength of their position. The panel's *Manual for Complex and Multidistrict Litigation*, as revised May 18, 1970, incorporates the discovery and other features pioneered in the electrical and other antitrust cases. A number of the provisions are of material benefit to the plaintiff, e.g., section 0.5 provides that in the absence of rare and exceptional circumstances "... all parties should proceed simultaneously with discovery in the separate stages."<sup>16a</sup>

Rule 23 of the Federal Rules of Civil Procedure is another cause for concern to potential defendants since exposure to liability is enlarged if the court designates the complaint as a class action and directs that notice be sent to members of the class.<sup>17</sup> The complaint as a class action

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13. *Philadelphia Electric Company v. Anaconda American Brass Company*, 47 F.R.D. 557, 558 (E.D. Pa. 1969). Thirteen copper and brass producers paid \$22,127,500 to more than 800 plaintiffs. *Wall Street Journal*, June 21, 1969.

14. 312 F. Supp. 478 (S.D.N.Y. 1970).

15. 314 F. Supp. 710 (S.D.N.Y. 1970). Also see *supra*, note 1 at 160-161 for other large recoveries.

16. C. A. PETERSON, JR. AND J. T. McDERMOTT, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970).

16a. 49 F.R.D. 217 (1970).

17. Rule 23(c)(2), F.R. Civ. P.

enables the original plaintiff or a small number of original plaintiffs<sup>18</sup> to call to the attention of others similarly situated the existence of the case, its allegations and the opportunity to participate. The more class members who join, the more the plaintiffs can combine their efforts, knowledge and resources to include every member of the class who does not exclude himself<sup>19</sup> unless, of course, the court strikes the class action allegations of the complaint after passing of a deadline for members of the class to intervene.<sup>20</sup> Not every case has been allowed to proceed as a class action,<sup>21</sup> but those that have been declared class actions have enlarged the liability of the defendants.<sup>22</sup>

Potential antitrust defendants with grounds to believe they may be exposed to antitrust litigation have reason to note the growth of the "respectability"<sup>23</sup> of such litigation and the steady rise in the number of cases filed.<sup>24</sup> The annual report of the Director of the Administrative Office of the United States Courts said that in fiscal 1970 the number of new federal antitrust cases rose by 17 per cent over fiscal 1969, to 877, compared with 740 in fiscal 1969.<sup>25</sup> The report indicated that the government's case load continued at a comparatively even pace—56 cases (52 civil, 4 criminal) were filed in fiscal 1970, one less than the 57 filed in fiscal 1969 (43 civil, 14 criminal).<sup>26</sup> And commencing with the

18. "One or more members of a class may sue or be sued . . . ." Rule 23(a), F.R. Civ. P. *infra*, note 78.

19. Rule 23(c)(2), F.R. Civ. P.

20. *Id.* L. H. EIGER, *Private Consumer Substantive and Procedural Remedies Under the Antitrust Laws*, XV ANTITRUST BULLETIN 316-317 (1970).

21. *City of New York v. International Pipe and Ceramics Corporation*, 44 F.R.D. 584 (S.D.N.Y. 1968); *State of Utah v. American Pipe and Construction Co.*, 49 F.R.D. 17 (D.C. Calif. 1969); *United Egg Producers v. Bauer International Corporation*, 312 F. Supp. 319 (S.D.N.Y.); *Mangano v. American Radiator & Standard Sanitary Corporation*, 50 F.R.D. 13 (E.D. Pa. 1970), and *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 1970 Trade Cases, ¶ 73,410 (E.D. Pa. Dec. 14, 1970).

22. *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), affirmed as modified, *Chicken Delight, Inc. v. Harris*, District Judge, 412 F.2d 830 (9th Cir. 1960); *State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559 (Minn. 1968); *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *Philadelphia Electric Company v. Anaconda American Brass Company*, 43 F.R.D. 452 (E.D. Pa. 1968), and *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969). One conclusion to be drawn between cases allowed to proceed as class actions and those refused class action status is that the class must be clearly defined and identifiable, e.g., franchisees or public bodies, and large, but not too large for management and disposition of the litigation.

23. S. E. KEANE, *Section 1 of the Sherman Act*, 37 ANTITRUST L.J. 632, 639 (1968).

24. C.C.H. TRADE REGULATION REPORTS BULLETIN, no. 493, November 23, 1970. The comparable number of private suits filed, excluding the electrical equipment cases for prior years was: 1965—443; 1966—444; 1967—536, and 1968—659: E. G. GASS, *Private Enforcement of the Robinson-Patman Act: The Damage Controversy*, XV ANTITRUST BULLETIN 153 (1970).

25. C.C.H. TRADE REGULATION REPORTS BULLETIN, no. 493, November 23, 1970.

26. *Id.*

electrical equipment conspiracy cases, defendants have the added headache of a large, well financed plaintiff.<sup>27</sup> These plaintiffs become all the more formidable when, as in the Western Pipe and other recent multi-plaintiff cases, they maintain a common front and act through lead counsel.<sup>28</sup>

Large plaintiffs with equally large damages can be, depending on one's viewpoint, avenging angels or avenging bounty hunters. Webster's defines a bounty hunter as "one that hunts predatory animals for the reward offered" or "tracks down and captures outlaws for whom a reward is offered."<sup>29</sup> Webster's further defines bounty as including a reward, premium or subsidy, especially when offered by a government, e.g., to encourage the destruction of noxious animals.<sup>30</sup> Assuming that the speakers used the words "bounty hunter"<sup>31</sup> in accordance with the dictionary definition, it would appear, by definition, that antitrust violators are "outlaws" and that an antitrust plaintiff "bounty hunter" serves a purpose that the government, which authorizes him to seek the "bounty" of treble damages, considers socially beneficial.

This socially useful purpose of allowing private persons to oppose monopolies and combinations in restraint of trade did not spring into the air with the electrical conspiracy cases (the 1960's). Antitrust has ancient common law roots<sup>32</sup> which long-preceded the 1890 Sherman Act.<sup>33</sup> The Clayton Act provision for treble damages and costs<sup>34</sup> also has this ancient common law ancestry. A 1623 Act of Parliament declared monopolies void and authorized treble damages and double costs.<sup>35</sup> We may assume that the treble damage and double costs provisions were designed to encourage private enforcement, for double costs under the British system of court costs is more punitive than the

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27. "It is now by no means strange to have plaintiffs who are larger and wealthier than the defendants and to find them eminently better equipped with the necessary funds and manpower to carry on long and expensive legal struggles." E. G. Gass, *Private Enforcement of the Robinson-Patman Act: The Damage Controversy*, XV ANTITRUST BULLETIN 153 note 16 (1970).

28. In the Western Pipe Cases, plaintiffs, who numbered some 350, and a relative handful of defendants, were directed to appoint respective lead counsel as spokesmen to assist the Court.

29. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged, p. 260.

30. *Id.*

31. *Supra* notes 2 and 3.

32. J. L. ALIOTO, *The Economics of a Treble Damage Case*, 23 ANTITRUST L.J. 87, footnote 1 (1960). The Case of Monopolies, 11 Co. Rep. 84 b, 77 English Reprints 1260 (1601) held void as contrary to common law a grant by the Crown of the monopoly of making and selling playing cards.

33. 26 Stat. 209.

34. 15 U.S.C. § 15.

35. An Act Concerning Monopolies and Dispensations With Penal Laws and the Forfeitures Thereof, Jac. ch. 3 (1623).

single costs deemed adequate by the Congress in the American counterpart.<sup>36</sup> The traditional public antipathy to restraint of trade is reflected in an Oregon Supreme Court decision.<sup>37</sup> The arguments opposing the playing card monopoly in the Case of Monopolies<sup>38</sup> are a mixture of Elizabeth I era language and Latin and Greek, yet the English portions of the case have a modern ring, for the public policy objections to restraints of trade are as applicable today as in 1601.

In considering the "bounty hunter" objection to private enforcement of the antitrust laws it is important to note that such enforcement helps the antitrust laws to perform three *pro bono* functions:

1. Oppose the "cartelization" of American industry;
2. Discourage attempts to create monopolies, by mergers or otherwise;
3. Help maintain equality of economic opportunity and freedom of entry in industry.<sup>39</sup>

And since so much of antitrust law enforcement is by private parties and non-federal public bodies, it is enlightening to find that: "The antitrust laws fulfill these three functions by the very fact of their existence and enforcement. Their broad deterrent effect is more important than the visible effects of particular cases. . . ."<sup>40</sup> Therefore, the "bounty hunter" objection should be measured against the purpose of the Sherman Act as enunciated by the Supreme Court.<sup>41</sup> Assuming

36. 15 U.S.C. § 15.

37. "As stated in 19 R.C.L. 10, § 4, monopolies and combinations in restraint of trade 'are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use. Monopoly is said to be destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred on corporations or individuals, and therefore, public policy is, and ought to be, as well as public sentiment, against it.'" *Schwab v. Motion Picture Operators*, 165 Or. 602, 622, 109 P.2d 600, 607 (1941). Such declarations serve as a reminder of the purpose of the antitrust laws and help to balance hair-splitting distinctions that defeat the legislative intent.

38. *Supra* note 32.

39. S. N. WHITNEY, II ANTITRUST POLICIES 436-437 (1958).

40. *Id.* at 437.

41. The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 45 (1958).

*arguendo* that a plaintiff is a "bounty hunter," the policy granting the bounty of treble damages, costs and attorneys' fees has been approved in numerous Supreme Court and lower federal court decisions,<sup>42</sup> including *Zenith Radio Corp. v. Hazeltine Research, Inc.* where the Court said, "... the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purposes of enforcing the antitrust laws. *E.g., United States v. Borden Co.*, 347 U.S. 514, 518 (1954). . . ."<sup>43</sup> The policy of allowing private enforcement to supplement public enforcement is a reflection of the realization that:

A violation of the antitrust laws is, in effect, a plundering raid into the market place. As is the case with all predatory excursions, the strong and powerful enjoy the advantages while the weak and the small suffer loss, ruin and destruction.<sup>44</sup>

The "bounty hunter" tag as used by Pollack is limited to "passing-on" situations in which he asserts that the plaintiffs recover four times the amount of the overcharge—once from their own customers and three times the amount of the overcharge from the defendants.<sup>45</sup> He therefore excludes (1) treble damage actions in which no "passing-on" defense is involved, (2) cases settled for less than four times the amount of the overcharge,<sup>46</sup> or (3) cases in which part or all of the overcharge is absorbed for competitive or other reasons and is not passed on to the ultimate customer. He states that "Under the bounty-hunter approach, injury is of course irrelevant. The principal difficulty with such an approach is that Congress quite plainly never adopted it."<sup>47</sup> The

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42. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1969); *Simpson v. Union Oil Company of California*, 411 F.2d 887, 904 (9th Cir. 1969), rev'd. on other grounds, 396 U.S. 13 (1969); *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577, 591 (D.C. A. 1969), and *United States v. American Bakeries Company*, 284 F. Supp. 864, 869 (Mich. 1968). Also see *supra* note 2, footnote 38 at 363. A classic statement is found in *United States v. Standard Ultramarine and Color Company*, 137 F. Supp. 167, 170 (S.D.N.Y. 1955):

The antitrust statutes, as has so often been emphasized, are aimed at assuring that our competitive enterprise system shall operate freely and competitively. They seek to rid our economy of monopolistic and unreasonable restraints. Upon their vigorous and constant enforcement depends the economic, political and social well-being of our nation. The concept that antitrust violations are "minor" and "technical" infractions, involve no wrongdoing, and merely constitute "white collar" offenses, has no place in the administration of justice.

43. *Id.* at 130-131.

44. P. F. ZIEDMAN, *The Small Business Administration and Private Antitrust Litigation*, 36 ANTITRUST L.J. 188 (1967).

45. *Supra* note 3, at 38.

46. *Id.*

47. *Id.*



Supreme Court has rejected such an assertion by holding that a buyer who is overcharged by a monopolist is injured even though he can pass the overcharge along to the ultimate consumer. The Court then enunciated the following principles:

1. . . . when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.
2. . . . if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed.
3. . . . the buyer is equally entitled to damages if he raises the price for his own product.
4. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.<sup>48</sup>

The Supreme Court cited three cases<sup>49</sup> as holding that "In those cases the possibility that the plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages."<sup>50</sup> It was made clear that allowance of the "passing-on" defense could mean that the violator would escape retribution:

In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.<sup>51</sup>

In light of post-*Hanover Shoe* decisions which recognize the "passing-on" defense despite its apparent demise<sup>52</sup> it is significant that the Supreme Court preceded its recitation of factors relied on in the

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48. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489-490 (1968). It was followed by *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), which rejected a remoteness defense.

49. *Id.* at 490.

50. *Id.*

51. *Id.* at 494.

52. *Mangano v. American Radiator & Standard Sanitary Corporation*, 50 F.R.D. (E.D. Pa. 1970) and *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 1970 Trade Cases, ¶ 73,410.

subsequent decisions by stating, "We are not impressed with the argument that sound laws of economics require recognizing this defense."<sup>53</sup> The factors that followed this statement are apparently given as the reasons for not allowing the "passing-on" defense. Were the cited factors to be considered defenses it is assumed that the Supreme Court would have so identified them. These cited factors are not part of the *dictum*:

We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. *We also recognize that where no differential can be proved* between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.<sup>54</sup> (Emphasis supplied)

The above-emphasized language indicates that the Supreme Court, in view of its vigorous opposition to summary judgments in antitrust litigation,<sup>55</sup> intends that the plaintiff is to be given the opportunity to prove his damages. The four principles set forth in *Hanover*<sup>56</sup> do not appear to foreclose the ultimate consumer or anyone else in the chain of distribution. In a proper case the plaintiff can establish that each middleman passed on the overcharge, as was done in the Western Pipe Cases.<sup>57</sup> Proof of damage may be difficult, but "justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."<sup>58</sup> The *Manual for Complex and Multidistrict Litigation* contains a number of recommendations relating to proof of facts in complex cases.<sup>59</sup>

If victims in the chain of distribution, including the ultimate customer, are not allowed to attempt to prove their damages, the anti-trust violator retains the fruits of his wrongdoing despite the holding of *Hanover* that he is not to do so. *Mangano*,<sup>60</sup> which revives the "passing-on" defense, may be considered of limited authority since the

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53. *Supra* note 48, at 492.

54. *Id.* at 494.

55. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

56. *Supra* note 48.

57. With monotonous regularity the approximately 50 contractors deposed said that they passed on the cost of the pipe to the plaintiffs, who were the "end-users" or ultimate customers.

58. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

59. § 2.61 Proof of Facts in Complex Cases, et seq.

60. *Supra* note 52.

plaintiffs failed to file full and complete answers to interrogatories despite the opportunity to do so. The ruling might have been otherwise had the plaintiffs submitted full and complete answers and made discovery as to damages and submitted proof that ascertainable overcharges had been passed on to them. The authority of *Philadelphia Housing Authority*<sup>61</sup> is lessened by the fact that the court deemed itself bound by the rule of the law of the case established by *Mangano*,<sup>62</sup> and therefore the public bodies were not allowed to prove their damages as end-users. Three of the four cases relied on by plaintiffs as allowing end-users to overcome the "passing-on" defense were distinguished on their facts in *Philadelphia Housing Authority* and all four cases were not followed on the ground that they were decided before *Hanover*.<sup>63</sup> It is difficult to distinguish the facts in *State of Washington v. American Pipe and Construction Co.*<sup>64</sup> from those in *Philadelphia Housing Authority*,<sup>65</sup> for in both cases the generic product was pipe which passed through middleman contractors and subcontractors and reached the end-user plaintiffs as a finished, installed product. In both cases the public body plaintiffs contracted for a finished product installed pursuant to contract.

If *Mangano* and *Philadelphia Housing Authority*<sup>66</sup> are sustained, the "windfall"<sup>67</sup> objection to treble damage actions will be moot and the antitrust violator will retain the fruits of his wrongdoing. Assuming *arguendo* that there is a "windfall" in the limited group of cases to which the term has been applied,<sup>68</sup> various factors reduce the practical significance of the objection.<sup>69</sup> If the successful plaintiff is a public

61. *Id.*

62. *Id.* The four cases relied on by plaintiffs are *State of Washington v. General Electric Co.*, 246 F. Supp. 961 (W.D. Wash. 1965); *State of Missouri v. Stupp Bros. Bridge & Iron Co.*, 248 F. Supp. 169 (W.D. Mo. 1965); *State of Washington v. American Pipe and Construction Co.*, 274 F. Supp. 961 (W.D. Wash. 1967), and *Armco Steel Corp. v. State of North Dakota*, 376 F.2d 206 (8th Cir. 1967). The court did not identify the three cases it said make them distinguishable.

63. *Supra* note 52 at page 89,673.

64. *Supra* note 62.

65. *Supra* note 52.

66. *Id.*

67. *Supra* notes 2 and 3.

68. *Id.*

69. Plaintiffs often have "record retention programs" which result in disposal of purchase records required to prove the purchases portion of an antitrust case, e.g., until the policy was changed at the request of the Antitrust Division the State of Oregon destroyed its purchase records after six years. In the Western Pipe Cases certain of the plaintiffs in the State of Oregon case were unable to identify all suppliers of pipe to middleman contractors who had gone out of business or otherwise could not identify the manufacturer from which they had purchased the pipe. Accordingly, various transactions were excluded from the settlement where neither side could establish that the purchases were covered by the settlement.

utility, the recovery can be taken into account for rate-adjustment purposes. The taxpayer receives the benefit if the plaintiff is a public body. Statutes of limitations, lost or discarded transaction records or the difficulty of proving the full amount of damages are other obstacles to obtaining a theoretical quadruple damages. The objection is further qualified by the observation that:

My experience is that antitrust issues generally are resolved by attrition rather than by trial in the courthouse, and that they are decided by calculating minds putting price tags on peace and expense, rather than by triers of fact attempting to price real damage.<sup>70</sup> . . . [D]efendant counsel usually are aware from the start of the great value of attrition . . . .<sup>71</sup>

Finally, “. . . [I]f there is to be a windfall, plaintiffs as innocent purchasers should receive it rather than defendants.”<sup>72</sup>

Running through much of the antitrust literature is the implicit theory that it is proper for the antitrust victim to be fleeced, but it is not “sporting” for the victim to seek to recover his losses from the “white collar” criminal. This theory is apparent in comments concerning successful efforts by victims to make use of the investigations of antitrust violations by the U.S. Department of Justice and the efforts of public officials to advise public bodies that they have a cause of action. As an example, a reference to the electrical equipment conspiracy contains the observation that “This was not the first time customers of an industry had moved in to share the spoils of a raid by the Justice Department.”<sup>73</sup> The description of a “raid” is apt, for the definition of the word includes “any sudden invasion of some place by police, for discovering and dealing with violations of the law.”<sup>74</sup>

The Justice Department did its duty in prosecuting a long-standing conspiracy. The electrical equipment industry customers and the public were victimized by the overcharges, yet attempts to obtain damages are described as “spoils” instead of reimbursement or recoveries.

The states have been accused of too-zealous an enforcement of the law:

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70. M. A. HOFFMAN, *Proof of Damages in Private Litigation*, 36 ANTITRUST L.J. 151 (1967).

71. *Id.* at 167.

72. *Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company*, 355 F.2d 203 (7th Cir. 1964).

73. *Supra* note 2 at 363.

74. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, Unabridged, Second Edition, p. 1754.

## Commentary

Moreover, many of these new types of plaintiff seem to feel an almost Messianic duty to press their suit. For example, many states suing on behalf of their municipalities felt they had an obligation to the people of their states not only to sue *but also to try the case unless the defendants compensated them for full damages.*<sup>75</sup> (Emphasis Supplied)

No reason was given why a state should be considered for the view that a lawsuit must be tried in the absence of a satisfactory settlement. A state and its Attorney General have been criticized for notifying members of the class of the pendency of an antitrust action:

... Increasingly, I believe, the courts will be forced to look into these factors which induce a Messianic complex not on the part of the client but on the part of counsel . . . For instance, consider the letter recently sent out by the Attorney General of a western state to municipalities within this state, reading as follows: . . . .<sup>76</sup>

The letter in question advised the municipalities that the Office of the Attorney General would file a price-fixing suit pursuant to a statute authorizing filing of treble damage claims, and that cities desiring to file that type of product antitrust case could file an independent action or be represented by the outside counsel representing the state. The letter was analogous to the police notifying persons whose homes had been burglarized that stolen goods had been recovered and the homeowners were invited to visit the police station and attempt to identify the property. The Attorney General notified members of the class that he was filing a class action on their behalf, as he was authorized to do by a specific enabling statute that imposed an affirmative duty to represent the state and its local public bodies in treble damage actions. An Attorney General should not be criticized, it is submitted, for doing what he was directed by statute to do—to uphold and advance the public interest and to take joint legal action.

The speaker also cited a memorandum of the National Institute of Municipal Law Officers to its members which said in part that "The NIMLO Committee on Antitrust Violations recommends that interested member cities join and file a class action." The memorandum was an attorney-to-attorney type communication and was as proper as any other communication between attorneys concerning matters of mutual interest. No public policy appears to be violated when at-

75. Panel discussion, Sections 1 and 2 of the Sherman Act Generally: *Developments at Large and Portents of Things to Come*, 37 ANTITRUST L.J. 657, 663-664 (1968).

76. *Id.* at 664.

torneys for public bodies by notifying attorneys representing public bodies of a cause of action and a means of aggregation of resources to prosecute the case.

Treble damage actions by public bodies frequently are class actions,<sup>77</sup> hence the following passage bears on the issue of the propriety of a public attorney communicating with other public attorneys concerning possible litigation:

Those who criticize the class action on the ground that it stirs up plaintiffs and serves only to provide fees for attorneys overlook the fact that we are not dealing with the traditional lawsuit which concerns primarily those litigants before the court. The public's concern with openness and honesty in public securities markets gives it an interest no less significant than that of particular plaintiffs and defendants.

Moreover, Rule 23 has built-in limitations against abuse. As the Supreme Court pointed out in *Cohen v. Beneficial Industrial Loan Corp.*, the strike suit constituted the principal misuse of this device. Rule 23 remedies this abuse by barring the extortionate secret settlement.<sup>78</sup>

The Judicial Plan on Multidistrict Litigation appears to have rejected the view that an Attorney General or other public officer or agency may not, in the course of official duty, communicate with public bodies concerning class actions. The exemption is contained in a recommendation by the panel that the district courts adopt a local court rule to prevent potential abuse of class actions.<sup>79</sup> The manual's Suggested Local Rule No. 7 provides in part:

The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraphs (b)(c) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to

77. *E.g.*, *State of Illinois v. Brunswick Corporation*, 32 F.R.D. 453 (N.D. Ill. 1963). *But see*, *State of Utah v. American Pipe and Construction Company*, 49 F.R.D. 17 (C.D. Cal. 1969).

78. *Dolgow v. Anderson*, 43 F.R.D. 472, 487-488 (E.D.N.Y. 1968).

79. *Supra* note 16 at 229.

reflect adversely on any party, any counsel, the Court, or the administration of justice.<sup>80</sup>

Suggested Local Rule No. 7 specifically exempts attorney-client communications and public officer and public agency communications:

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) *communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel*, or misrepresenting the status, purposes or effect of the action and orders therein.<sup>81</sup>

Where the suggested local rule adopted, an Attorney General or other public officer would remain free to communicate with public bodies concerning actual or proposed antitrust litigation. Where a statute specifically authorizes an Attorney General to represent public bodies or requires him to give notice of the filing of an action, it would appear that any such communication would not be the solicitation of "representation by counsel" within the prohibition of Suggested Local Rule No. 7. The suggested rule refers to "parties,"<sup>82</sup> hence by definition the rule would not apply until filing of the potential or actual class action. The potential class action members would be free to communicate concerning the subjects regulated by the suggested rule until filing of a potential or actual class action.

Suggested Local Rule No. 7 applies to both sides after filing of the complaint, although the restrictions bear more heavily on plaintiffs. The suggested rule would hinder plaintiffs, who generally have limited resources, in seeking and obtaining pre-trial litigation funds from potential supporters. The defendant counsel is not similarly handicapped, for it is the rare antitrust defendant who must solicit defense funds and agreements to share the burden of a judgment or settlement.<sup>83</sup>

The suggested rule would have the perhaps unintended effect of restricting plaintiffs' pre-trial preparation. Members of the class are prime sources of evidence and in the absence of the suggested rule,

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80. *Id.*

81. *Id.*

82. *Id.*

83. There was a sharing agreement in the Western Pipe Cases.

plaintiffs and their counsel can obtain signed statements and documents from class members without the knowledge of the defendants. The suggested rule does not specifically state that the parties cannot communicate with potential class members to obtain evidence, but the provision of "included but are not limited to,"<sup>84</sup> may be construed to preclude evidence-gathering among class members by plaintiffs without a motion for permission to do so that would alert defendants. Members of the class so identified thus could be exposed to pressure and perhaps retaliation before a plaintiff could obtain a statement or document.

The suggested rule would hinder defendants by, for example, forbidding a defendant, without court approval, from soliciting potential members of the class to sign statements that the member does not wish to be a member of the class. A recent Opinion of the Oregon State Bar declares that such solicitation by defendant's counsel or under his direction is a violation of Rule 11 of the Oregon State Bar Rules of Professional Conduct, which provides that a member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy in the absence and without the consent of such counsel.<sup>85</sup>

The opinion responded to the following fact situation:

A, a franchisee of B, files a complaint against B on behalf of himself and all other franchisees of B. C., *attorney for B, supervises agents of B who solicit the franchisees* to sign a statement that the signer does not wish to be included in the group which A seeks to represent, or to be represented by A and his attorneys, but expresses no opinion as to the merits of the complaint. B and its franchisees are adversaries if the Court rules that the complaint may be maintained as a class action. The statements are obtained directly from the franchisees, although some are represented by counsel, while the Court has before it A's motion to designate the complaint a class action. (Emphasis Supplied.)

The opinion cited Rule DR 7-104 of the American Bar Association Code of Professional Responsibility,<sup>86</sup> and held:

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84. *Supra* note 79.

85. Opinion No. 192, *Communication With Prospective Party to Class Action*, *Opinions of Committee on Legal Ethics*, amended and approved by the Board of Governors, November 6, 1970, 31 OREGON STATE BAR BULLETIN, December 1970.

86. (a) During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer.



The inquiry is answered in the affirmative with respect to those franchisees represented by counsel. Those not represented by counsel may be contracted, provided that a full disclosure concerning the attorney's interest in the matter is made, no representations are put forward concerning the legal rights of those contracted, and scrupulous care is taken that no statement is made which may tend to mislead the informed.

It is the opinion of the committee, under the facts stated, that C has violated the provisions of Rule 11 of the Rules of Professional Conduct of the Oregon State Bar. His purpose in soliciting statements is other than mere fact-finding, and the individuals contacted are entitled to know the ramifications of their election. In order to be properly advised concerning such an election, they should have the advantage of independent legal advice. The attorney has a duty, particularly towards those not represented by counsel, to avoid everything that may tend to mislead such a party, and solicitation of such a statement has the tendency to mislead.<sup>87</sup>

Prior to publication of Opinion No. 192,<sup>88</sup> District Judge A. T. Goodwin issued an order in a franchisee antitrust case governing unauthorized communications with potential litigants.<sup>89</sup> The order was based on Suggested Local Rule No. 7 and by coincidence incorporated the essence of Opinion No. 192.<sup>90</sup> Included in the order are provisions allowing the franchisees to communicate among themselves and allowing the plaintiffs' counsel to communicate with franchisees for trial preparation purposes.<sup>91</sup>

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(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such persons are or have a reasonable possibility of being in conflict with the interests of his client. (Emphasis supplied)

87. *Supra* note 85.

88. *Id.*

89. Charles A Vanlandingham, et al. v. Denny's Restaurants, Inc., et al., D. Ore., Civil No. 69-424, October 29, 1970.

90. 3. The communications forbidden by this Order include: . . .

(3) solicitation by parties to the action to Denny's Restaurants, Inc. franchisees to take a position concerning the action.

(4) solicitation or negotiation by defendants, their counsel or their officers, agents or employees to Denny's Restaurants, Inc. franchisees with intent to prevail upon any such franchisees not to become a plaintiff in intervention or to withdraw from the action;

(5) offers by defendants herein, their counsel or their officers, agents or employees to any Denny's Restaurants, Inc. franchisees to purchase their franchise, amend their franchise agreement with any defendant or subsidiary of any defendant, compromise any claim against the franchisee, or in any other way, method or manner, to influence or attempt to influence any such franchisee not to become a plaintiff in intervention herein; . . . .

91. (4) This order does not forbid: . . .

(c) Communications between the plaintiffs herein and present and former Denny's Restaurants, Inc. franchisees which do not have the effect of soliciting representation by counsel or solicitation of litigation funds or agreements to pay fees and expenses

Despite the announcement of the opening of the Golden Age of the antitrust plaintiff,<sup>92</sup> and the claim that a recent decision "was the ill wind that could blow the lid off a Pandora's box of unwarranted litigation,"<sup>93</sup> the obstacles to the most meritorious claim remain formidable. During the first 50 years of the Sherman Act, plaintiffs were successful in only 13 of 175 treble damage actions, recovering \$1,270,000, while decisions awarding an additional \$12,756,000 were overruled by appellate courts.<sup>94</sup> "Of 169 cases tried between 1952 and 1958, 28 were won and 141 were lost."<sup>95</sup> "The odds favor the defendant."<sup>96</sup> Even if the plaintiff prevails, the court may reject or exclude evidence of damages and award nominal damages representing but a fraction of the cost to the plaintiff of prosecuting his case to a "successful" conclusion.<sup>97</sup> And indeed, Joseph L. Alioto, a dean of the plaintiff's antitrust bar, has listed three of the obstacles to the "Golden Age"—a war of attrition, a sometimes hostile judge, and an inability to procure evidence after proper discovery orders have been signed and executed.<sup>98</sup>

Assuming a prospective antitrust plaintiff has a meritorious claim, the first obstacle is financial. With exceptions the antitrust victim is a small or bankrupted businessman of limited means who may lack the resources to prosecute his claim, even on a contingent basis, because of the heavy pre-trial expense for which antitrust litigation is unhappily noted. This writer has observed that defendants display an inordinate interest in determining the financial resources of a private

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in this action, or misrepresenting the status, purposes or effect of the action, orders and their counsel herein;

(d) communications between the plaintiffs herein, and present and former Denney's Restaurants, Inc. franchisees solely for purposes of trial preparation herein which do not have the effect of soliciting representation by counsel or solicitation of litigation funds or agreements to pay fees and expenses in this action, or misrepresenting the status, purposes, or effect of the action and orders herein.

92. *Supra* note 2 at 363.

93. *Supra* note 1 at 154.

94. *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHICAGO L.R. 130, 138 (1958).

95. *Supra* note 11 at 92.

96. M. L. BLECHER, *The Plaintiff's Viewpoint*, 38 ANTITRUST L.J. 50, 51 (1968).

97. In *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Association of America*, 393 F.2d 75 (9th Cir. 1968), cert. den. 393 U.S. 938, plaintiff spent \$78,496.40 in attorneys' fees and expenses. He was awarded nominal damages trebled to \$10,200, costs taxed at \$4,603.92 and \$5,000 attorneys' fees. The Ninth Circuit Court of Appeals doubled the attorneys' fees to \$10,000 for 2,289 hours of litigation effort.

98. *Supra* note 11 at 92. "The years that followed the enactment of the treble damage provisions revealed that few private litigants had the resources or staying power to conduct a protracted and difficult antitrust case. And those who were able and willing to assume the staggering costs of litigants were frequently worn out by their opponents by sheer attrition." *United States v. Standard Ultramarine and Color Company*, 137 F. Supp. 167, 171, footnote 4 (S.D.N.Y. 1955).

plaintiff,<sup>99</sup> presumably to evaluate whether he has the means to finance his case in the face of attrition. The disparity in resources is evident in cases in which the plaintiff is represented by one or two attorneys and the defendants, whose resources may total in the billions, are represented by the proverbial courtroom of attorneys on a minor motion.

A common obstacle may be termed the *de minimus* problem. The claim may be meritorious, but the estimated recovery, even after trebling, does not appear to justify the effort and expense because of the relatively small amount of purchases involved.<sup>100</sup> This obstacle becomes more controlling if the case is transferred to a distant district, thereby increasing the travel and associate counsel costs. Public bodies, especially the smaller ones, frequently encounter the *de minimus* problem and may not take action unless other co-plaintiffs agree to join and share expenses and carry their share of the burden of prosecuting the case.

Another obstacle is the chilling effect on a prospective plaintiff of the customary disparity in size and resources. "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."<sup>101</sup> Consequently, members of a class may understandably be reluctant to become parties to litigation in which their resources are limited and, in their eyes, the defendant's resources are unlimited.

The financially capable plaintiff then must surmount numerous legal defenses which can and often do deprive plaintiffs of reimbursement for damages for reasons that have nothing to do with the justice of the case. As stated by John R. Hally:

I think anyone who has worked with treble damage litigation for any length of time has seen cases with excellent liability thrown

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99. "I was called upon some years ago to defend a couple of treble damage cases, but they did not get any farther than an order that I obtained from the federal judge requiring the plaintiff to furnish copies of his income tax returns." DAUGLAS ARANT, *Section 2 of the Sherman Act*, 37 ANTITRUST L.J. 643, 644 (1968).

100. In denying a class action motion, *State of Utah v. American Pipe and Construction Company*, 49 F.R.D. 17 (C.D. Cal. 1969), quoted in footnote 19 the affidavit of an Assistant Attorney General for the State of Idaho which said in part that "... the Special Assistant Attorney General informed ROBERT M. ROBSON that the State of Idaho did not sustain sufficient damage as a result of the alleged violations in the above entitled matter to warrant the expense involved in instituting an independent action on behalf of the State of Idaho. Relying upon this advice, the Idaho Attorney General did not file a complaint against the above named Defendants." The reasons cited in the affidavit support the statement in *Epstein v. Weiss*, 50 F.R.D. 387, 395 (La. 1970) that "The class action is obviously superior in cases such as this where a large number of individuals may have been injured, but where no one person may have been damaged to the degree which would have induced him to institute litigation solely on his own behalf. . . ."

101. *Shell Oil v. Federal Trade Commission*, 360 F.2d 470, 487 (5th Cir. 1966).

out of court or fail in terms of damages or meaningful recovery for such reasons as that in the contemplation of the law the plaintiff simply is not a damaged party, as the courts view it, he is not in the target area of the defendant's violation no matter how clear they may be.<sup>102</sup>

The obstacle can start at the complaint-drafting stage. In some jurisdictions antitrust complaints appear to be an exception to the provisions of the federal rules that a short and plain statement of the jurisdiction and claim is sufficient,<sup>103</sup> although a leading commentator asserts with authority that "the dispute appears to have been resolved in favor of notice pleading."<sup>104</sup>

If the plaintiff believes the complaint may be attacked on grounds such as lack of interstate commerce, detailed allegations of the flow of commerce across state lines are desirable. Standing to sue requires violation of the antitrust laws as defined<sup>105</sup>—interstate trade or commerce, injury to business or property, and causal relationship or connection between the violation and the injury.<sup>106</sup> The reports are filled with cases in which a plaintiff's claim was dismissed without adjudication of the merits.<sup>107</sup> One or more defendants may move to dismiss or transfer the case for lack of venue. The motion, if granted, forces the plaintiff to sue in a distant judicial district rather than in the district of his choice and can place him at a tactical and financial disadvantage. However, the antitrust venue statutes<sup>108</sup> allow a corporate defendant

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102. Primer on New Directions and Old Guideposts in Antitrust: Principles, Policies and People, Third New England Antitrust Conference 144 (1969).

103. Rule 8, F.R. Civ. P. "The new rules, however, restrict the pleadings to the task of general notice-giving." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

104. E. C. TIMBERLAKE, *Federal Treble Damage Antitrust Actions* 61-62 (1965). However, in *Burkhead v. Phillips Petroleum Company*, 308 F. Supp. 120, 122 (N.D. Calif. 1970) the court said of exclusive supplier and *per se* retail price maintenance allegations:

The vice of these allegations is the failure of plaintiff to set out supporting facts showing *how* Phillips has controlled the retail prices charged by plaintiff for gasoline and *in what manner* Phillips has exercised this control so as to violate the antitrust laws. Without such additional facts, the recitation concerning Phillips' control over retail gasoline prices is merely a conclusion of law and an improper pleading.

Similarly, *Bailey's Bakery, Ltd. v. Continental Baking Company*, 235 F. Supp. 705, 713 (Haw. 1964) said the complaint "must allege facts showing that the defendants' acts unduly and appreciably restrained or may reasonably be expected to restrain the free flow of interstate commerce."

105. *Supra* note 1.

106. W. A. BATES, *The Treble Damage Remedy: Standing to Sue, Venue and Process*, 38 CINCINNATI L.R. 168, 269 (1969); *State of Minnesota v. United States Steel Corporation*, 299 F. Supp. 506, 600-601 (Minn. 1969). Also see, *John Kalin Funeral Home, Inc. v. Fultz*, 313 F. Supp. 435 (W.D. Wash. 1970) and *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969).

107. *E.g.*, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), and *Nationwide Auto Appraiser Service v. Association of Casualty and Surety Companies*, 382 F.2d 925 (10th Cir. 1967).

108. *Supra* note 106 at 273; 15 U.S.C. 15, 22.

to be sued in any district in which it is an inhabitant, may be found, or transacts business, and affords only limited protection to defendants.<sup>109</sup> The general venue statute<sup>110</sup> supplements the antitrust venue statutes,<sup>111</sup> and has been amended to authorize venue in the judicial district "in which the claim arose."

Another defense is the statute of limitations,<sup>112</sup> which commences to run when the interest of the plaintiff is injured or invaded, but is subject to tolling for fraudulent concealment and certain government actions.<sup>113</sup> In cases where the last injury occurred after the running of the statute of limitations a plaintiff's claim may be barred if an officer or employee was aware of the conspiracy prior to the date of the last occurrence. Still to be determined on a case-by-case basis are the precise boundaries of the *pari delicto* exemption in *Perma Life* which is granted to plaintiffs who do not bear an equal responsibility for creating and establishing an illegal scheme or who are required by economic pressures to accept such an agreement.<sup>114</sup> There are a host of exemptions, statutory and judicially created, that may bar a cause of action.<sup>115</sup> However, "Immunity from the antitrust laws is not lightly implied"<sup>116</sup> and "... Regulated industries are not *per se* exempt from the Sherman Act."<sup>117</sup>

Proof of damages is the final and sometimes insurmountable obstacle. To recover damages in a private action, the plaintiff must prove that the defendant violated the antitrust laws, that the violation caused damage to the plaintiff, and the amount of the damage so caused.<sup>118</sup> "I think we have also seen cases where both violation and fact of damage were well established and the plaintiff failed through lack of adequate proof of amount of damages."<sup>119</sup>

109. *Thill Securities Corporation v. New York Stock Exchange*, 283 F. Supp. 239, 245 (Wis. 1968).

110. 28 U.S.C. § 1391(b).

111. *ABC Great States, Inc. v. Globe Ticket Company*, 304 F. Supp. 1052, 1054-1055 (N.D. Ill. 1969); *Albert Levine Associates v. Bertoni & Cotti*, 314 F. Supp. 169, 171 (S.D.N.Y. 1970).

112. 15 U.S.C. § 15b.

113. *Supra* note 106 at 284-285.

114. *Premier Electric Construction Company v. Miller-Davis Company*, 442 F.2d 1132, 1138 (7th Cir. 1970).

115. ZIPSER, *The Anatomy of Judicial Exemptions from Antitrust: A Study in Gap-Filling*, 15 WAYNE L.R. 813 (1969).

116. *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962).

117. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456 (1945). But neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action. *Alabama Power Company v. Alabama Electric Cooperative*, 394 F.2d 672 (5th Cir. 1968), cert den. 393 U.S. 488.

118. *Supra* note 106 at §16.

119. *Supra* note 102 at 144.

A number of the obstacles are judicially created and have had the effect of narrowing the field of action, although it may be assumed that a defendant would declare that a restrictive or interpretative decision merely precluded unwarranted litigation. A study made for this article supports the view that the lower federal courts often take an unduly restrictive view of the antitrust laws to the disadvantage of plaintiffs, governmental and private. The study covered 20 years of Supreme Court decisions ended December 31, 1969, and counted as "reversed" any decision pertaining to the Sherman, Clayton or Robinson-Patman acts that were reversed in whole or in part or vacated and remanded, except one decision "modified and affirmed." Of the 120 antitrust cases during the 20-year period, the Supreme Court reversed 96, or 80 per cent. Plaintiffs prevailed on appeal in 101, or 84 per cent, of the cases. While it may be assumed that a number of cases were decided to reverse erroneous lower court decisions, it is significant that the plaintiffs, not defendants, prevailed in the overwhelming majority of the decisions. Thirty-seven of the 120 cases were private actions. Of the 37 private actions, the plaintiffs prevailed in 30, or 81 per cent. The Supreme Court reversed 33, or 89 per cent, of the 37 private actions.

Starting with the electrical equipment cases, a growing number of states and their local public bodies have entered the treble damage field. The number and variety of cases since 1960 suggests that illegal price-fixing is much more prevalent in the case of sales to government agencies than in the case of sales to private firms.<sup>120</sup> Analysis of Sherman Act indictments for the period 1955 to 1965 listed indictments in 38 of the 78 major groups in the standard industrial classification, including indictments in 18 of the 21 groups in the manufacturing division.<sup>121</sup>

The states and their public agencies have responded to the problem by prosecuting cases alone or in cooperation with other states and public bodies. It is becoming a common practice for separate cases in various judicial districts to be transferred to one district for consolidated proceedings,<sup>122</sup> enabling the plaintiffs to share expenses common to all cases and to spread the workload while obtaining the benefit of the expertise of the more experienced plaintiffs.

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120. KUHLMAN, *Nature and Significance of Price Fixing Rings*, 2 ANTITRUST & ECONOMICS REVIEW No. 3, 69, 77 (1969).

121. L. EARLE BIRDZELL, JR., *What Can Be Done to Minimize Danger of Antitrust Litigation? Preventive Measures, Handling Government Investigations and the Roles of Corporate Counsel and Outside Counsel*, 38 ANTITRUST L.J. 126 (1968).

122. *Supra* note 16.

Although some defense attorneys may believe that the states are entirely too active in prosecuting treble damage actions, a number of meritorious cases have not been filed for lack of funds, manpower and related reasons. This observation can be tested by comparing the number of states that filed suit in various national conspiracy actions with the number that theoretically could have filed suit.

Two legislative actions would enable the states and their local public bodies to make better use of state and federal antitrust laws to prosecute their antitrust claims:

1. A declaration of legislative intent to enable the Attorney General to prosecute antitrust claims and to assist local public bodies in antitrust matters. This declaration of legislative intent can be embodied in statutes of the type enacted by Oregon,<sup>123</sup> Kansas<sup>124</sup> and Ohio.<sup>125</sup>

2. Appropriations sufficient to enable the Attorney General to implement the legislative declaration of intent. Oregon and New Jersey and perhaps other states have created a statutory antitrust revolving account to finance litigation.<sup>126</sup>

Meanwhile, the antitrust enforcement states such as California can

123. ORS 30.312 provides:

The State of Oregon, any city, county, school district, municipal or public corporation, political subdivision of the State of Oregon or any instrumentality thereof, or any agency created by two or more political subdivisions to provide themselves governmental services may bring an action in behalf of itself and others similarly situated for damages under ORS 279.032 or under section 4 of the Act of October 15, 1914, ch. 323, as amended prior to January 1, 1965 (15 U.S.C. 15).

124. 6 Kansas Statutes Annotated § 75-713 provides:

Whenever it appears that the state of Kansas or any city, town, political subdivision or other governmental agency, body or authority established under the laws of the state of Kansas has been so injured or damaged by any conspiracy, combination or agreement in restraint of trade or commerce or similar unlawful actions, so as to entitle the state of Kansas, a city, a town or political subdivision or other such governmental agency, body or authority to a right to bring any action or proceeding for the recovery of damages under the provisions of any state or federal anti-trust or other similar law, the attorney general shall have the authority to institute and prosecute any such actions or proceedings on behalf of the state of Kansas or of any city, town, or political subdivision, or other governmental agency, body or authority established under the laws of the state of Kansas or any city, town, political subdivision or other governmental agency, body or authority in such actions or proceedings.

125. 1 Page's Ohio Revised Code Annotated, Title 1, Chapter 109, provides:

Sec. 109.81. The attorney general shall act as the attorney at law for the state and may act, by agreement, as the attorney at law for any political subdivision of the state or governing body thereof in antitrust cases and do all things necessary to properly represent them in any such case under the laws of any state or the federal government.

126. ORS 180.095; New Jersey Laws of 1970, Chapter 73, approved and effective May 21, 1970, appropriated \$100,000 for an antitrust revolving account. CCH TRADE REGULATION REPORTER ¶ 33,301.19. *Also see*, CCH TRADE REGULATION REPORTER ¶ 31,931, relating to a Kansas Attorney General's antitrust revolving fund, and Section 109.82, 1 Page's Ohio Revised Code Annotated, Title 1, Chapter 109, creating a section of antitrust and the Attorney General antitrust fund.

continue to increase their exchange of information and consultation activity to include states not now active in antitrust enforcement. Interstate cooperation in this field has proved beneficial to the cooperating states and expansion of this *pro bono* activity should prove equally beneficial to other states, their taxpayers, and equally important, the competitive enterprise system.



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